83-137

No. ..-...

IN THE

Supreme Court of the United States

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October Term, 1983

BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC.,
Petitioner,

vs.

VICKI BARTELT,
Respondent.

BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC.,
Petitioner,

vs.

LYDIA MELSEN,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Questions Presented.

1. Can a female employee who alleges that she replaced a male employee at less pay for equal work claim a continuing violation of Title VII of the Civil Rights Act of 1964 every time she subsequently receives a paycheck?

2. Can an employee allege an equal pay for equal work violation under Title VII of the Civil Rights Act of 1964 if the claim would not constitute a violation of the Equal Pay Act of 1963?

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Berlitz Schools of Languages of America, Inc. (hereinafter referred to as "Berlitz"),[1] respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing the grant of summary judgment to Berlitz in two actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (hereinafter referred to as "Title VII"), and remanding to the District Court for further proceedings.

Opinions Below.

The opinion of the Court of Appeals reversing the grant of summary judgment and remanding is reported at 698 F.2d 1003 and appears at Appendix A, *infra*, pages 1 to 11. The order of the Court of Appeals denying Berlitz' petition for rehearing and rejecting Berlitz' suggestion for rehearing *en banc* appears at Appendix B, *infra*, page 12.

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[1]Pursuant to this Court's Rule 28.1, Berlitz states that it is wholly owned by Macmillan, Inc. Domestic subsidiaries and affiliates of Berlitz are the following: Abrasive Action, Inc.; Associated Mailers, Inc.; Bradbury Press, Inc.; Business Mailers, Inc.; Collier Macmillan International, Inc.; Convenient Ticket Company; Gump's, Inc. (California); Gump's, Inc. (Texas); Katharine Gibbs School (Incorporated) (New York); Katharine Gibbs School (Incorporated) (Connecticut); Katharine Gibbs School (Incorporated) (Maryland); Katharine Gibbs School (Incorporated) (Massachusetts); Katharine Gibbs School (Incorporated) (New Jersey); Katharine Gibbs School (Incorporated) (Rhode Island); Katharine Gibbs School — Huntington (Incorporated); G. Schirmer, Inc.; LaSalle Extension University; Lexington Andrews International, Inc.; Macmillan Book Clubs, Inc.; Macmillan Capital Corporation; Macmillan Charter, Inc.; Macmillan Financial Corporation; Macmillan Investment Corporation; Macmillan Performing Arts, Inc.; Macmillan Ticket Company; National Register Publishing Company, Inc.; P.F. Collier, Inc.; P.F. Collier Export Company; Standard Rate and Data Service, Inc.; The Berlitz Schools of Languages of East Asia, Inc.; The Berlitz Schools of Languages of New York, Inc.; U.S. School of Music, Inc; Crowell International, Inc.; Front & Brown Corp.; Glencoe Publishing Co., Inc.; Associated Music Publishers, Inc.; Katharine Gibbs Realty Trust; P.J. Kennedy & Sons; and Standard Rate & Data Service, Inc.

Jurisdiction.

The opinion of the Court of Appeals was entered on February 8, 1983. The Court of Appeals filed its order denying Berlitz' petition for rehearing and rejecting the suggestion for rehearing *en banc* on April 28, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved.

United States Code, Title 42, Section 2000e-5(e)

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

United States Code, Title 42, Section 2000e-2(h)

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or priv-

ileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

United States Code, Title 29, Section 206(d)(1)

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees of the opposite sex in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage

rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Statement of the Case.

Berlitz is in the business of teaching foreign languages and providing translation services at schools located throughout the United States. Each school is headed by a Director who is primarily responsible for its overall operation.

In January 1975, Respondent Lydia Melsen (hereinafter referred to as "Melsen") was appointed Acting Director of the school located in Oakland, California, replacing Walter Haeussler, the previous Director. More than three years later, Melsen filed a charge of discrimination with the Equal Employment Opportunity Commission, dated November 14, 1978, in which she claimed that she had been denied equal pay for equal work. She subsequently filed an action under Title VII on May 1, 1979.

In July 1977, Respondent Vicki Bartelt (hereinafter referred to as "Bartelt") was transferred to the school located in Palo Alto, California to become Director, replacing Gunther Barth, the previous Director. Nearly two years later, she filed a charge with the Equal Employment Opportunity Commission, dated April 11, 1979, in which she claimed that she had been denied equal pay for equal work. She subsequently filed an action under Title VII on January 14, 1980.

In their respective complaints, Melsen and Bartelt alleged denial of equal pay for equal work, in comparison both to the individual male school directors whom they had replaced and to other male school directors employed at schools in different locations.

After completion of discovery, Berlitz moved for summary judgment in each lawsuit on October 30, 1980. The

grounds for Berlitz' motions were, *inter alia:* (1) that Melsen and Bartelt had failed to file timely charges of discrimination alleging equal pay violations in comparison with their respective predecessors; and (2) that Melsen and Bartelt could not advance equal pay claims in comparison to male school directors employed at schools in different locations.

On January 6, 1981, the United States District Court for the Northern District of California issued an Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment in Melsen's lawsuit. Judgment was entered in favor of Berlitz on May 8, 1981.[2] On January 6, 1981, the District Court also issued an Order Granting Defendant's Motion for Summary Judgment in Bartelt's lawsuit. Judgment was entered in favor of Berlitz on February 5, 1981. Melsen and Bartelt appealed the judgments to the United States Court of Appeals for the Ninth Circuit. On June 19, 1981, the cases were ordered consolidated for appeal.

On February 8, 1983, the Court of Appeals rendered its decision, with Judge Poole dissenting, reversing the grant of summary judgment to Berlitz and remanding the case to the District Court. On February 18, 1983, Berlitz petitioned for rehearing and suggested rehearing *en banc*, arguing that the opinion of the Court of Appeals was at odds with applicable decisions of this Court and with previous decisions of the Court of Appeals. Berlitz' petition and suggestion was denied by the Court of Appeals on April 28, 1983.

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[2]The District Court granted summary judgment on Melsen's equal pay claims but denied summary judgment on a retaliation claim. When the retaliation claim was subsequently dismissed with prejudice by stipulation of the parties, judgment was entered in favor of Berlitz.

REASONS FOR GRANTING THE WRIT.

This case presents two significant issues concerning litigation of equal pay claims under Title VII rather than the Equal Pay Act. The first concerns the point at which the time period for filing a Title VII charge of discrimination begins to run where an employee alleges denial of equal pay for equal work in comparison to her predecessor. Berlitz argued, and the District Court agreed, that in such circumstances the time limitation specified in Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), begins to run at the point when the aggrieved party replaces his or her predecessor. Because Melsen and Bartelt filed their charges of discrimination substantially more than 300 days after replacement of their predecessors, their claims were time-barred. The Court of Appeals reversed, holding that a policy of paying lower wages to female employees constituted a continuing violation and that both Melsen and Bartelt therefore filed charges within 300 days of the payment of an allegedly discriminatory wage. App. A at 3.

The second issue concerns what standards govern an equal pay claim when brought under Title VII rather than the Equal Pay Act. Berlitz argued, and the District Court agreed, that Melsen and Bartelt could not advance equal pay claims in comparison to male directors employed in different establishments. The Court of Appeals reversed this ruling. Although it agreed that the single establishment restriction contained in the Equal Pay Act would have prevented Melsen and Bartelt from pursuing their equal pay claims under that statute, the Court of Appeals held that the single establishment requirement did not apply to such equal pay claims when brought under Title VII. *Id.* at 7-8.

A. The Decision of the Court of Appeals Nullifies the Timeliness Requirements Contained in Section 706(e) of Title VII.

In their Title VII lawsuits, Melsen and Bartelt first alleged denial of equal pay for equal work in comparison to their male predecessors. On this claim, the District Court granted summary judgment because Melsen and Bartelt had not filed charges of discrimination until considerably more than 300 days after replacing their male predecessors at allegedly lesser compensation.

Pursuant to Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), Melsen and Bartelt were required to file charges of discrimination no more than 300 days after the occurrence of the alleged discrimination.[3] *Mohasco Corp. v. Silver*, 447 U.S. 807, 810 (1980). What is at issue herein is when this time period began to run. Berlitz argued, and the District Court agreed, that the 300 days began running when Melsen replaced Walter Haeussler, at allegedly lower compensation for allegedly equal work, and when Bartelt replaced Gunther Barth, at allegedly lower compensation for allegedly equal work.

The Court of Appeals reversed the District Court's ruling. Relying on *Jenkins v. Home Insurance Company*, 635 F.2d 310 (4th Cir. 1980), and *Satz v. ITT Financial Corp.*, 619 F.2d 738 (8th Cir. 1980), and referring to a previous decision in *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980), the Court of Appeals held that a policy of paying lower wages to female employees on each payday constituted a continuing violation and that both Melsen and Bartelt had, therefore, filed charges within 300 days of the

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[3]Because the alleged discrimination occurred in California, a deferral state, Melsen and Bartelt were the beneficiaries of the extended time period contained in 42 U.S.C. § 2000e-5(e).

payment of an allegedly discriminatory wage. App. A at 3.

This Court specifically analyzed application of the time limitations contained in 42 U.S.C. § 2000e-5(e) in *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *accord, Chardon v. Fernandez*, 454 U.S. 6 (1981). The Court has also discussed the concept of continuing violations under Title VII in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). In reversing the District Court, the Court of Appeals failed to apply correctly the analysis set forth in these authorities; indeed, these decisions of the Court were not even referred to in the opinion of the Court of Appeals.

The result is a holding which, as described in the dissent, is "quite unsupported by logic or policy or anything in the language of Title VII." App. A at 9. By gerrymandering two discrete acts of alleged discrimination — the replacement of two male school directors at alleged lower pay for alleged equal work — into a "policy" of discrimination, the Court of Appeals essentially nullified the timeliness requirements contained in 42 U.S.C. § 2000e-5(e). The effect of its ruling is to eliminate any time limit at all for filing such equal pay charges under Title VII. This contradicts the purpose of the time requirements contained in 42 U.S.C. § 2000e-5(e), which is to "protect employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State College v. Ricks, supra*, 449 U.S. at 256-57.

This Court first addressed the issue of timeliness and continuing violations under Title VII in *United Airlines, Inc. v. Evans, supra.* In that case, the Court rejected the contention of a female flight attendant that her loss of seniority based upon past actions of her employer constituted a "continuing violation" of Title VII. The Court held that the continuing effects of a past act of discrimination did not form the basis for a Title VII claim if that past act had not

been timely challenged. The Court thus stated that:

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. . . .
>
> Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently than former employees who resigned or were discharged for a nondiscriminatory reason. In short, the system is neutral in its operation.

United Air Lines, Inc. v. Evans, supra, 431 U.S. at 558.

Following *United Air Lines,* the Court analyzed in *Delaware State College v. Ricks, supra,* the point at which the time periods specified in 42 U.S.C. § 2000e-5(e) begin to run. The Court held that the time within which a college professor had to file a charge alleging discriminatory denial of tenure began to run when he was formally notified of the denial of tenure, not from his last day of work. The Court stated that:

> Determining the timeliness of Ricks' EEOC complaint, and this ensuing lawsuit, requires us to identify precisely the "unlawful employment practice" of which he complains. Ricks now insists that discrimination

> motivated the College not only in denying him tenure, but also in terminating his employment on June 30, 1975. . . . In effect, he is claiming a "continuing violation" of the civil rights laws with the result that the limitations periods did not commence to run until his one-year "terminal" contract expired. This argument cannot be squared with the allegations of the complaint. *Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.* [Citation omitted.] If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment. But the complaint alleges no such facts.

Delaware State College v. Ricks, supra, 449 U.S. at 257 (emphasis added).

Observing that "termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure," the Court further held that, in order to have the time period for filing a charge run from his last day of employment, Ricks would have had to allege and prove that his manner of termination differed from that of other professors who had been denied tenure. *Delaware State College v. Ricks, supra,* 449 U.S. at 257-58. The Court's decision in *Chardon v. Fernandez, supra,* reaffirmed this analysis.

The District Court properly applied the *United Airlines* and *Delaware State College* analysis to the instant cases. The unlawful employment practice of which Melsen and Bartelt complain is their replacement of male predecessors at allegedly lower compensation for allegedly equal work. Any effect on their subsequent compensation was simply "a delayed, but inevitable, consequence" of the compensation first set upon replacement of their male predecessors. *Delaware State College v. Ricks, supra,* 449 U.S. at 257-

58; *see Trabucco v. Delta Airlines*, 590 F.2d 315, 316 (6th Cir. 1979). Once their salaries were set, the mere fact that Melsen and Bartelt continued to receive the same paycheck again and again did not constitute a continuing violation. There was no allegation that *after* replacement of their male predecessors, Melsen's and Bartelt's salaries were modified in a manner different from that of other school directors.

Rejecting such an analysis, the Court of Appeals instead relied upon the purported existence of a "policy of paying lower wages to female employees on each payday." App. A at 3. The difficulty with this assertion is that there is no identification of what this purported policy is, whom it is alleged to have affected, or when it was purportedly in existence. Neither Melsen nor Bartelt ever alleged that anyone else at Berlitz had been discriminated against in a similar manner, and neither alleged any type of unlawful discrimination other than denial of equal pay, with the exception of Melsen's claim of retaliation which was subsequently dismissed with prejudice by stipulation.

As pointed out in the dissent to the opinion below, the Court of Appeals has used this assertion of a "policy" to skirt the requirement for filing charges within 300 days of the alleged discriminatory act. As the dissent states:

> The majority seeks shelter for this rationale by calling two discrete situations cumulatively a "policy." These are two separate cases which were not, when challenged on summary judgment, augmented by appropriate evidence sufficient to justify the terminology of "policy" or "practice" as we know those words.

Id. at 10.

Certainly something more needs to be alleged and proven than two discrete acts of discrimination to constitute a policy sufficient to overcome the purpose intended by 42 U.S.C. § 2000e-5(e). In *International Brotherhood of Teamsters v.*

United States, 431 U.S. 324, 336 (1977), for example, this Court defined a pattern and practice of discrimination as "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts" but rather "the company's standard operating procedure — the regular rather than the unusual practice." *See Jewett v. International Telephone and Telegraph Corp.*, 653 F.2d 89, 91-92 (3rd Cir. 1981).

Reliance by the Court of Appeals on *Jenkins v. Home Insurance Co.*, *supra*, and *Satz v. ITT Financial Corp.*, *supra*, is misplaced. In both cases, a present and continuing equal pay violation on a paycheck by paycheck basis was found to have been alleged because the equal pay comparison was made between male and female employees who *continued* in their employment. Thus, at each paycheck, an equal pay comparison could arguably be made between present employees and a present equal pay violation alleged. Such was not the case in the instant lawsuits with respect to Melsen's and Bartelt's predecessors; their employment as directors ceased when Melsen's and Bartelt's began.

The practical consequences of the Court of Appeals' ruling on this issue is to eliminate any time requirement at all for filing such charges of discrimination, thus nullifying Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e). Under its continuing violation theory, an employee could conceivably claim an equal pay violation based upon a compensation decision made as much as 15 or 20 years before merely because the employee continued to receive a paycheck. As the dissent notes, the majority opinion holds that:

> [I]f a member of a protected class is hired at a discriminatory wage, that person presumably may wait for years and years before bringing charges because each pay check tendered by the employer constitutes a "continuing violation" of the original act of discrimination.

App. A at 9.

For this reason, reliance by the Court of Appeals below on a continuing violation theory appears to be at odds with a number of other appellate decisions which apply the time limitations contained in 42 U.S.C. § 2000e-5(e) to various employment situations. *See, e.g., Heymann v. Tetra Plastics Corp.*, 640 F.2d 115, 120, 123 (8th Cir. 1981) (failure to timely challenge initial job assignment and layoff); *Goldman v. Sears, Roebuck & Co.*, 607 F.2d 1014, 1017-19 (1st Cir. 1979), *cert. denied*, 445 U.S. 929 (1980) (dismissal of claims of discriminatory transfer as untimely despite allegations of repeated requests for return to original position); *Martin v. Georgia-Pacific Corp.*, 568 F.2d 58, 61-62 (8th Cir. 1977) (untimely challenge to alleged denial of transfer based on seniority); *Trabucco v. Delta Airlines, supra* (dismissal of lawsuit charging discriminatory reclassification from teletype operator to transportation agent because of failure to file a timely EEOC charge); *Milton v. Weinberger*, 645 F.2d 1070, 1074-77 (D.C. Cir. 1981), and *Patterson v. General Motors Corp.*, 631 F.2d 476, 483-85 (7th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981) (both rejecting arguments that denial of promotion constituted a continuing violation).

This Petition should, therefore, be granted in order to review the opinion of the Court of Appeals on the timeliness issue, because its ruling effectively nullifies the requirements of 42 U.S.C. § 2000e-5(e) based upon a continuing violation theory which is at odds with applicable decisions of this Court.

B. Failure to Apply Equal Pay Act Standards to Equal Pay Claims Brought Under Title VII Will Permit Inconsistent Results Depending Upon the Statute Sued Under.

In addition to equal pay claims in comparison to their predecessors, Melsen and Bartelt also alleged that they had been denied equal pay in comparison to male directors em-

ployed at Berlitz schools in different locations. In its opinion, the Court of Appeals agreed that such claims would not constitute a violation of the Equal Pay Act because the comparison was not asserted between employees of a "single establishment." App. A at 7-8. However, because Melsen and Bartelt brought their equal pay claims under Title VII, rather than the Equal Pay Act, the Court of Appeals held that the single establishment criterion did not apply, and it therefore reversed the District Court's grant of summary judgment. *Id.* at 8.

The issue of whether Equal Pay Act standards govern equal pay claims brought under Title VII has not been considered by this Court. Contrary to the implication in the opinion below, *id.*, this question was not decided in *County of Washington v. Gunther*, 452 U.S. 161 (1981). Rather, the sole issue considered in *Gunther* was whether sex-based compensation claims *other than equal pay claims* could be brought under Title VII. *County of Washington v. Gunther, supra*, 452 U.S. at 163, 166, n.8. By the time the *Gunther* litigation had reached this Court, the plaintiff's equal pay claims were no longer at issue. *Id.* at 165.

Resolution of this issue is necessary to avoid future misapplication of the Court's *Gunther* decision and to eliminate present uncertainties as to what standards apply to equal pay claims brought under Title VII. If allowed to stand, the decision below permits advancement of equal pay claims under Title VII which would be invalid under the Equal Pay Act, resulting in inconsistent results on the same claim depending upon the statute sued under.

It should be clear that the instant lawsuits involve only claims of denial of equal pay and not claims of other types of sex-based compensation discrimination. An unfortunate imprecision in the language used by the Court of Appeals to describe the issue raised and the precise nature of Mel-

sen's and Bartelt's claims might leave a contrary impression. For example, the Court of Appeals defined the issue as follows:

> The district court also granted summary judgment on the ground that, as a matter of law, the data concerning the salaries of male directors at other Berlitz schools would not establish a violation of Title VII because it did not show that the employer *discriminated in the payment of wages* to employees within a single establishment, a requirement of an Equal Pay Act violation. See 29 U.S.C. § 206(d) (1976).
>
> The premise underlying this ground for dismissal is that a *sex-based wage discrimination claim* may be brought under Title VII only if the evidence supporting the charge would establish a violation of the Equal Pay Act.

App. A at 4 (emphasis added).

Notwithstanding this language, only claims of denial of equal pay for equal work were advanced in these cases. The charges of discrimination filed by Melsen and Bartelt specifically alleged equal pay violations.[4] Equal pay claims were alleged in their complaints and in the pretrial papers filed with the District Court.[5] In fact, in their opening brief

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[4]The description by the Court of Appeals of Melsen's charge of discrimination as "charging Berlitz with discriminating against her in the payment of wages based on her sex," App. A at 2, is inaccurate because of its lack of precision. Melsen's charge specifically alleged that:

> I have been paid lesser salaries, commissions and bonuses as a female employee than male employees for doing substantially equal work, requiring substantially equal skill, effort and responsibility, performed under similar working conditions.
>
> I file this complaint on behalf of myself and past, present and future female employees who have been denied equal pay for equal work.

The language of Bartelt's charge is virtually identical.

[5]Both complaints alleged payment of lesser salaries, commissions and bonuses as a female employee than male employees for doing substantially equal work requiring substantially equal skill, effort and responsibility.

to the Court of Appeals, Melsen and Bartelt stated that "Appellants bring their action pursuant to Title VII *and allege that they were denied equal pay for equal work* while employed at Respondent Berlitz Schools of Languages" (Emphasis added.)

Since only equal pay claims are at issue in this case, the question remains whether such claims, when brought under Title VII, must satisfy Equal Pay Act requirements. The ruling of the Court of Appeals below that they do not contradicts language contained in an appellate decision from the same Circuit, thus creating considerable confusion. In its first opinion in *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1979), the Court of Appeals for the Ninth Circuit stated that "we hold that Equal Pay Act Standards apply in Title VII suits when plaintiffs raise a claim of equal pay.[6] *Id.* at 1313. In its opinion denying rehearing, the Court of Appeals again held that:

> [W]hen a discrimination claim is based on a theory that the plaintiffs are denied equal pay for equal work, Equal Pay Act standards are applicable. When a claim of discrimination is not based on an equal work theory, it must be analyzed separately under Title VII.

Id. at 1318 (citation omitted).

The rationale for this previous Ninth Circuit ruling in its *Gunther* decision was the avoidance of inconsistencies between the Equal Pay Act and Title VII when only equal pay claims are at issue. As that opinion stated:

> The cases considering the relationship between Title VII and the Equal Pay Act have involved claims that females were being denied equal pay for equal work. *See, e.g., Di Salvo*, 568 F.2d 593; *Orr v. MacNeill*,

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[6]The opinion further held that "decisions interpreting the Equal Pay Act are authoritative where plaintiffs suing under Title VII raise a claim of equal pay." *Id.*

> 5 Cir., 511 F.2d 166. Quite properly, these cases have construed the two statutes harmoniously; any other approach may have produced different results depending on whether a plaintiff labeled his cause of action as being brought under "Title VII" or under the "Equal Pay Act."

Id. at 1311.[7]

This Court's discussion in its *Gunther* decision of the legislative history of the Bennett Amendment to Title VII supports such reasoning. As the Court noted, the Bennett Amendment was incorporated into Title VII as a result of Congressional concern over the potential inconsistencies between Title VII and the Equal Pay Act. *See, County of Washington v. Gunther, supra,* 452 U.S. at 171-76. To allow equal pay claims under Title VII which could not be brought under the Equal Pay Act totally ignores such congressional concerns.[8]

Because of the substantial uncertainty as to what standards apply to equal pay claims when brought under Title VII and how such claims are to be adjudicated, review of this issue by the Court would be highly desirable.

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[7]The opinion further noted that, "[w]hen plaintiffs raise a claim under Title VII of discriminatory compensation in the absence of an allegation that they perform substantially equal work, no conflict with the Equal Pay Act arises because the Equal Pay Act is inapplicable." *Id.* at 1313.

[8]Failure to resolve the question of what standards govern equal pay claims brought under Title VII will cause additional confusion in conjunction with the litigation of such claims. For example, different standards of proof apply under Title VII and the Equal Pay Act. *Compare, Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-253 (1981), *with Corning Glass Works v. Brennan,* 417 U.S. 188, 195-196 (1974). Indeed, the Ninth Circuit has recently ruled in *Kouba v. Allstate Insurance Co.,* 691 F.2d 873, 875 (9th Cir. 1982), that the Equal Pay Act burden of proof applies to equal pay claims brought under Title VII, a decision which is at odds with the thrust of the opinion below.

Conclusion.

In order to resolve serious questions regarding the litigation of equal pay claims under Title VII, Berlitz respectfully requests that the Court grant its Petition for a Writ of Certiorari in order to review the decision of the Court of Appeals below.

Respectfully submitted,

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APPENDIX A

Opinion

United States Court of Appeals for the Ninth Circuit.

Vicki Bartelt, Plaintiff-Appellant, v. Berlitz School of Languages of America, Inc., Defendant-Appellee. No. 81-4064, DC. NO. C80-0104-RHS.

Lydia Melsen, Plaintiff-Appellant, v. Berlitz School of Languages of America, Inc. Defendant-Appellee. No. 81-4287, DC. No. C79-1033-RHS.

Filed: Feb. 8, 1983.

Argued and Submitted—April 14, 1982.

Appeal from the United States District Court for the Northern District of California, Robert H. Schnacke, District Judge, Presiding.

BEFORE: GOODWIN, FLETCHER, and POOLE, Circuit Judges.

FLETCHER, Circuit Judge:

Lydia Melsen and Vicki Bartelt brought separate actions against their former employer, Berlitz Schools of Languages of America, Inc. (Berlitz) under Title VII of the Equal Employment Opportunity Act, 42 U.S.C. § 2000e *et seq*. Both alleged that Berlitz discriminated against them as directors of Berlitz's schools by paying them lower salaries, commissions, and bonuses than either former male directors at their respective schools or male directors currently employed at other Berlitz schools. The district court granted Berlitz's motions for summary judgment. We reverse and remand both actions for further proceedings.

I

FACTS

Berlitz is a New Jersey-based corporation that operates language schools throughout the country. In 1968, Melsen began working for Berlitz in its Oakland school. In 1973,

she became assistant director, and in 1975, she replaced Walter Haeussler as acting director. She remained as director of the Oakland school until her termination in 1979.

Bartelt was hired by Berlitz as a management trainee in 1973 in the East Detroit school. In 1977, she transferred to the Palo Alto school and replaced Gunther Barth as director. She remained director until her termination in 1979.

In 1978, Melsen filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC), charging Berlitz with discriminating against her in the payment of wages based on her sex. Bartelt filed a similar charge with the EEOC in 1979.

In 1979, Melsen and Bartelt filed separate suits in district court. Both alleged that Berlitz violated Title VII by paying them less compensation than either their male predecessors or present male directors at other Berlitz schools for performing substantially equal work. At a hearing on Berlitz's motions for summary judgment, the district court ruled that: (1) neither Melsen nor Bartelt had filed a timely complaint with regard to charges that their compensation was less than their male predecessors because neither had filed a complaint with the EEOC within 300 days of their replacement of the former directors; and (2) neither could advance equal pay claims under Title VII based on a comparison with male directors employed in other Berlitz schools. The court granted summary judgment to Berlitz in both actions. Melsen's and Bartelt's appeals were consolidated by order of this court. We note jurisdiction under 28 U.S.C. § 1291 (1976).

II
DISCUSSION

A. STANDARD OF REVIEW

Summary judgment is proper only when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

B. TIMELINESS

The district court granted summary judgment in part because it found the plaintiffs' claims based on a comparison of their wages with their predecessors' wages time-barred. Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), requires that a discrimination charge be timely filed with the EEOC. Where, as here, there is a qualified state compliance agency, that time period is 300 days from the date of the alleged discriminatory act. *See Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 923 n.2 (9th Cir. 1982).

Berlitz argues that because Melsen and Bartelt began working as directors for Berlitz more than three hundred days before they filed a charge with the EEOC, their charges were untimely. We disagree. The policy of paying lower wages to female employees on each payday constitutes a "continuing violation." *Jenkins v. Home Insurance Co.*, 635 F.2d 310 (4th Cir. 1980); *Satz v. ITT Financial Corp.*, 619 F.2d 738, 743-44 (8th Cir. 1980). *See Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 759-61 (9th Cir. 1980). We conclude that the claims are timely because each plaintiff filed charges with the EEOC within three hundred days of a payment of allegedly discriminatory wages.[1]

---

[1]Berlitz's primary argument is that the limitations period should run from the date the plaintiffs became directors because it was at this time that their allegedly discriminatory wages were set. In the alternative, however, Berlitz argues that the period for filing commenced at the time that the male predecessors left their positions. In advancing this argument, Berlitz makes two assumptions. First, it assumes that in order to state an "equal pay for equal work" claim under Title VII, the plaintiff must allege facts sufficient to establish an Equal Pay Act violation. Second, Berlitz assumes that an Equal Pay Act claim must be based on a comparison between the wage rates of current employees within the establishment. From these premises Berlitz argues that the last day that plaintiffs' predecessors were "employees" was the last day that a Title VII violation existed. According to Berlitz's theory, plaintiffs had three hundred days from that date to file a charge with the EEOC.

We reject Berlitz's alternative argument because it is an irrational distortion of both statutes. This reasoning would lead one to conclude that if the predecessor employee left more than three hundred days before the replacement arrived, the replacement could never file a timely

(footnote continued on following page)

C. *THE SINGLE ESTABLISHMENT REQUIREMENT*

The district court also granted summary judgment on the ground that, as a matter of law, the data concerning the salaries of male directors at other Berlitz schools would not establish a violation of Title VII because it did not show that the employer discriminated in the payment of wages to employees *within a single establishment*, a requirement of an Equal Pay Act violation. *See* 29 U.S.C. § 206(d)(1976).

The premise underlying this ground for dismissal is that a sex-based wage discrimination claim may be brought under Title VII only if the evidence supporting the charge would establish a violation of the Equal Pay Act. The Equal Pay Act addresses the problem of discrimination in the payment of wages based on the sex of the employee. It makes it unlawful for employers to pay different wage rates, based on the sex of the employee, to employees in the same establishment who perform equal work. *See Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).[2] The coverage of

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charge with the EEOC. The time would have expired before any violation occurred.

We further note that under the Equal Pay Act plaintiffs need not rely solely on a discriminatory wage differential between *current* employees to establish a violation, but may make comparisons to prior employees. *See County of Washington v. Gunther*, 452 U.S. 161 (1981) (Rehnquist, J. dissenting) at 179 n.19; *id.* at 201-02. Thus even if it were necessary for the plaintiffs in this case to meet the criteria of the Equal Pay Act to state a claim under Title VII, a theory we reject, *see* discussion *infra*, that requirement has been met here.

[2]The Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19. It provides, in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

29 U.S.C. § 206(d)(1)

Title VII with respect to discrimination on account of sex is much broader. Title VII makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a). We note that the district court decided this case before the Supreme Court's decision in *County of Washington v. Gunther*, 452 U.S. 161 (1981) (Rehnquist, J. dissenting), which addressed the relationship of Title VII to the Equal Pay Act. *Gunther* rejected the assumption upon which the district court dismissed these actions.

In *Gunther*, the Supreme Court held that plaintiffs, four female prison guards, could bring claims of differential compensation under Title VII even though they could not satisfy the equal work standard of the Equal Pay Act. The Court rejected the argument that the Bennett Amendment to Title VII restricted Title VII's prohibition of sex-based wage discrimination claims to claims of "equal pay for equal work:"[3]

> In practical terms, [accepting this argument] means that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimi-

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[3]The Bennett Amendment provides:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act].

42 U.S.C. § 2000e-2(h).

> nation might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioners' interpretation. . . . Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII.

Gunther, 452 U.S. at 178-79.

Instead, the *Gunther* Court interpreted the Bennett Amendment as requiring only the incorporation of the four affirmative defenses of the Equal Pay Act into Title VII.[4] Thus, when faced with a sex-based wage discrimination claim brought under Title VII, the employer may successfully defend its action by showing that: (1) the compensation was paid pursuant to a seniority system; or (2) the payments were made pursuant to a merit system; or (3) the compensation was paid pursuant to "a system which measures earnings by quantity or quality of production;" or (4) the payments were based on any other factor other than sex. 29 U.S.C. § 206(d); *see Gunther*, 452 U.S. at 168-69.

Berlitz argues that the Supreme Court in *Gunther* did not specifically address claims based on an "equal pay for equal work" theory. When this theory is the basis for the claim under Title VII, Berlitz argues that the employer's action must constitute an Equal Pay Act violation. Otherwise, the result will be to subvert the scheme of the Equal Pay Act,

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[4]The court based its conclusion that the Bennett Amendment did not preclude the plaintiffs' Title VII claims on: (1) the language of the Bennett Amendment; (2) the legislative history of the adoption of the Amendment; and (3) the remedial purposes of the Equal Pay Act and Title VII.
Gunther, 452 U.S. at 168-80.

which Congress carefully designed to handle "equal pay for equal work" problems. The point of *Gunther*, however, is that Title VII's statutory scheme covers claims of sex-based wage discrimination, whether or not those claims also fall under the Equal Pay Act. Berlitz's view is contrary to the rationale of *Gunther* and the Supreme Court's pronouncement that courts must "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." *Gunther*, 452 U.S. at 178.

Moreover, contrary to Berlitz's assertions, the failure to read the "single establishment" restriction of the Equal Pay Act into Title VII will not result in numerous legal and practical problems nor will it thwart the sound policies of the Equal Pay Act. An Equal Pay Act challenge differs in important respects from an action brought under Title VII. Title VII contains a comprehensive scheme of administrative remedies that must be exhausted before suit is filed. 42 U.S.C. § 2000e-5. No administrative exhaustion is required under the Equal Pay Act.

Furthermore, the different statutes provide different remedies. Although Title VII authorizes a backpay remedy, under the Equal Pay Act, double back pay awards are authorized. *Compare* 42 U.S.C. § 2000e-5(g) *with* 29 U.S.C. § 216(b)(Supp. II 1978). The back pay recovery period in many cases will be longer under the Equal Pay Act than under Title VII. *Compare* 29 U.S.C. § 255 (1976)(employer who commits willful violation is liable for back pay for up to three years before suit is filed) *with* 42 U.S.C § 2000e-5(g) (recovery period limited to two years before date charges filed with the EEOC).

For these reasons, we reject Berlitz's approach. We agree that a comparison of plaintiffs' salaries with the salaries paid to male directors at other Berlitz schools is not between

employees of a "single establishment," and hence that Melsen and Bartelt would not be able to establish a violation of the Equal Pay Act by relying on this data. But plaintiffs have not brought an action under the Equal Pay Act. Title VII does not contain a "single establishment" limitation. *See Gunther*, 452 U.S. at 171. We hold that the evidence of the salaries of male directors at other Berlitz schools, which supports plaintiffs' sex-based wage discrimination claims, may be introduced to support a claim under Title VII even though it would not support an Equal Pay Act claim. It was error for the district court to grant summary judgment to Berlitz.

IV
CONCLUSION

Plaintiffs' claims based on a comparison of their salaries with their predecessors' are not time-barred. Evidence that Berlitz paid lower wages to plaintiffs than to male directors at other Berlitz Schools may be used to establish a sex-based wage discrimination claim under Title VII.

We REVERSE the grant of summary judgment to Berlitz and REMAND the case to the district court for further proceedings consistent with this opinion.

MELSEN V. BERLITZ SCHOOLS, No. 81-4287.

BARTELT V. BERLITZ SCHOOLS, No. 81-4067.

Filed: Feb. 8, 1983.

POOLE, Circuit Judge, dissenting.

I respectfully dissent for the reason that the claims of sex discrimination were untimely and thus the district court was correct in its grant of summary judgment.

The appellants claimed sex discrimination in that they were hired to fill jobs vacated by males and that from the outset they were paid less for the same work. But neither filed charges with the Equal Employment Opportunity Comission [*sic*] within the maximum 300 days as required by Section 706 of Title VII, 42 U.S.C. 2000-5(e). Nothing in this record implicates "equitable tolling" or other reason for this delay.

Melsen was first employed by Berlitz in 1968. She replaced a male Director at the Oakland school in January, 1975, at a rate of compensation lower than that paid her predecessor. But she did not file charges with EEOC until November 14, 1978, nearly four years later. Bartelt replaced a male as Director at the Palo Alto school in July, 1977. She did not file a charge until April 11, 197.., 21 months later.

My difference with the majority is obvious. They have neatly skirted the requirement of filing charges within 300 days by an expedient: they hold that if a member of a protected class is hired at a discriminatory wage, that person presumably may wait for years and years before bringing charges because each pay check tendered by the employer constitutes a "continuing violation" of the original act of discrimination.

This holding seems to me quite unsupported by logic or policy or anything in the language of Title VII. It does not

square with other cases. The majority has successfully rewritten the statute without waiting for a tardy Congress. This is troublesome. The view adopted today may seem better than the statutory policy but I do not understand such code updating to be our function. Nor does that view seem to comport with what the Supreme Court has stated in *United Air Lines v. Evans*, 431 U.S. 553 (1977), where Justice Stevens wrote:

> A discriminatory act which is not made the basis for a timely charge.
>
> Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity. The critical questions is whether any *present* violation exists. (Emphasis original.)

431 U.S. 558

The majority seeks shelter for this rationale by calling two discrete situations cumulatively a "policy." These are two separate cases which were not, when challenged on summary judgment, augmented by appropriate evidence sufficient to justify the terminlogy [*sic*] of "policy" or "practice" as we know those words. But we need not wrangle over arcane contentions of evidence because it is clear that the majority's position is that each subsequent salary payment as to each single receipient [*sic*] generates another violation (whether styled "new" or "further" or mere continuum). In whatever form it is wrapped, the holding bends the statute to accomplish a result, on the argument that the Supreme Court has not explicitly *said* that there is no such thing as continuing violation.

One cannot well read the majority or dissent in *Mohasco Corp. v. Silver*, 447 U.S. 807, (1980), without concluding that basic to Title VII is a purpose of requiring claims to

be raised while they are temporally and seasonably fresh. Discrimination claims are committed to administrative processing in the first instance so that they may be resolved administratively if possible, on the theory that securing the substance of civil rights is the objective rather than protracted and stale litigation. It may well be that enlargement of the time for filing charges, as the majority now sanctions, will prove a salutary event, should it survive. The problem is that we do not write on a clean slate and ours is hot the role of convenient emendation even in support of the most noble of causes.

APPENDIX B

Order

United States Court of Appeals for the Ninth Circuit.

Vicki Bartelt, Plaintiff-Appellant, vs. Berlitz Schools of Languages of America, Inc., Defendant-Appellee. No. 81-4064, D.C. No. C79-1033-RHS.

Lydia Melsen, Plaintiff-Appellants, vs. Berlitz Schools of Languages of America, Inc., Defendant-Appellee. No. 81-4287, D.C. No. C80-0104-RHS.

Filed: April 28, 1983.

Before: GOODWIN, FLETCHER, and POOLE, Circuit Judges.

The majority of the panel in the above case has voted to deny the petition for rehearing, and Judges Goodwin and Fletcher have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. FRAP 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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CLERK

No. 83-137

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC.,
Petitioner,

vs.

LYDIA MELSEN,
Respondent.

BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC.,
Petitioner,

vs.

VICKI BARTELT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a claim for denial of equal pay brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, a "continuing violation" which permits the filing of a claim within 300 days of the issuance of each pay check, or is a plaintiff forever barred from challenging discriminatory compensation if she does not file a charge within 300 days of her hire?

2. Does the "single establishment" limitation of the Equal Pay Act apply to an action for denial of equal pay brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*?

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No. 83-137

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BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC.,
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VS.

VICKI BARTELT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINION BELOW

The District Court for the Northern District of California granted summary judgment for defendant and petitioner herein. The Court of Appeals for the Ninth Circuit reversed the granting of summary judgment and remanded for further proceedings. This opinion is reported at 698 F.2d 1003 and appears as appendix A, pages 1 to 11, of Petitioner's Opening Brief. The court below denied

Berlitz's petition for rehearing and rejected its suggestion for rehearing *en banc*. This order appears as appendix B, page 12, of Petitioner's Opening Brief.

JURISDICTION

The opinion of the court of appeals was entered on February 8, 1983. The order denying Berlitz's petition for rehearing and rejecting the suggestion for rehearing *en banc* was entered on April 28, 1983. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Same as set forth at pages 3-5, of Petitioner's Opening Brief.

STATEMENT OF THE CASE

Respondent Lydia Melsen began working for Berlitz in 1968. In 1973, she was appointed Assistant Director, and in 1975, appointed Acting Director of the Oakland, California school. In November 1978, Melsen filed a charge of sex discrimination against Berlitz, and in May 1979, while still employed, filed a Title VII action in the District Court for the Northern District of California alleging that Berlitz paid her lesser salaries, commissions and bonuses than it did her male predecessor and male directors at other Berlitz schools performing substantially equal work requiring substantially equal skill, effort and responsibility. Melsen was terminated by Berlitz in August 1979.

Respondent Vicki Bartelt began working for Berlitz in 1973 as a Management Trainee in Illinois. In July 1977, she was appointed Director of the Palo Alto, California

school. In April 1979, Bartelt was terminated from this position by Berlitz and filed a complaint with EEOC the same month. In January 1980, Bartelt filed a Title VII action in the District Court for the Northern District of California alleging that Berlitz paid her lesser salaries, commissions and bonuses than it did her male predecessor and male directors of other Berlitz schools performing substantially equal work requiring substantially equal skill, effort and responsibility.

In October 1980, petitioner herein filed a Motion for Summary Judgment in each action. Petitioner contended among other things, that both plaintiffs had failed to file timely charges with EEOC, and that both plaintiffs were precluded from advancing claims with respect to school directors employed by Berlitz at its other schools. On December 19, 1980, the District Court granted, in part, Berlitz's Motion for Summary Judgment and dismissed the equal pay claims of both plaintiffs.[1]

On February 8, 1983, the Court of Appeals for the Ninth Circuit, Judge Poole dissenting, reversed the lower court's ruling and remanded the case for further proceedings. The appellate court determined (1) that an equal pay claim is a continuing violation thus rendering plaintiffs' claims timely, and (2) that a plaintiff bringing an equal pay claim under Title VII is not limited to the "single establishment" limitation of the Equal Pay Act,

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[1]Because plaintiff Bartelt's Complaint alleged only denial of equal compensation, the District Court's ruling effectively dismissed her entire action. The court let stand plaintiff Melsen's allegation of retaliation which was also the subject of Berlitz's Motion for Summary Judgment. The parties subsequently stipulated to a dismissal of the retaliation claim.

thus permitting plaintiffs to pursue their claims of unequal pay with respect to directors at certain other schools of defendant Berlitz. Berlitz's petition for rehearing and suggestion for en banc review were denied by the appellate court.

REASONS FOR DENYING THE WRIT

A. The Decision Below Is in Accord with the Unanimous Holdings of Other Circuits That a Policy of Paying Lower Wages to Female Employees Constitutes a Continuing Violation

Respondents Lydia Melsen and Vicki Bartelt contend that they were paid lower wages than their male predecessors and their male counterparts in other schools owned by petitioner Berlitz Schools of Languages of America, Inc. [hereinafter Berlitz] for work requiring the same skill, effort and responsibility. Each respondent filed a charge with the EEOC within 300 days of a payment of the allegedly discriminatory compensation. Notwithstanding this timely filing, petitioner argues that each lawsuit is time barred because if a violation occurred, it occurred only at the time each respondent replaced her predecessor which, in the case herein, was more than 300 days prior to the filing of EEOC charges. That is, Berlitz contends that although it allegedly paid each respondent discriminatory compensation for periods of three years (Respondent Melsen) and one year (Respondent Bartelt), each respondent's claim is time barred because each was filed more than 300 days after respondent replaced her male predecessor.

The Court of Appeals for the Ninth Circuit rejected Berlitz's argument by holding that a new violation occurs

with the issuance of each paycheck and that a "policy of paying lower wages to female employees on each payday constitutes a 'continuing violation.'" Petitioner's Opening Brief, app. A at 3. The court cited *Jenkins v. Home Insurance Co.*, 635 F.2d 310 (4th Cir. 1980) and *Satz v. ITT Financial Corp.*, 619 F.2d 738 (8th Cir. 1980) as support for its holding. In *Jenkins* and *Satz*, the courts of appeals were faced with the same question presented herein, and squarely held that the practice of paying unequal wages is a continuing violation. "The practice of paying discriminatorily unequal pay *occurs not only when an employer sets pay levels, but as long as the discriminatory differential continues.*" *Satz*, 619 F.2d at 743 (emphasis added). Indeed, "[t]his kind of continuing pattern of discrimination has been recognized by commentators as the most obvious type of continuing violation of Title VII." *Id.* at 744 n.10. In *Jenkins*, the court characterized the unequal wages as "a series of separate but related acts throughout the course of Jenkins' employment" occurring each time plaintiff was paid for the prior two-week work period, and stopping only when plaintiff's employment stopped. *Jenkins*, 635 F.2d at 312.

The holding below is in accord not only with *Jenkins* and *Satz*, but also with every other jurisdiction that has ruled on the question. *E.g., Clark v. Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978); *Egelston v. State University College*, 535 F.2d 752 (2d Cir. 1976); *EEOC v. Akron National Bank & Trust Co.*, 497 F. Supp. 733 (N.D. Ohio 1980); *Schulte v. State of New York*, 533 F. Supp. 31 (E.D.N.Y. 1981). Petitioner is unable to refer the Court to any cases with a contrary holding because the circuits are in unanimous agreement on this issue.

Nevertheless, petitioner seeks to create conflict where none exists by misciting authority from this Court and from other circuits. First, petitioner suggests that a different result should have been reached under the holdings of *Delaware State College v. Ricks,* 449 U.S. 250 (1980) and *United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977). However, the opinion below is consistent with both *Ricks* and *Evans.* The court below did not cite *Evans* and *Ricks* in its decision because it correctly perceived that the holdings in those cases were inapplicable to the present case.

In *Ricks,* the plaintiff was denied tenure and terminated one year later. Plaintiff Ricks argued that the statute of limitations should run from the date of the termination rather than the date of denial of tenure. The Supreme Court rejected this argument noting that the discriminatory act was the discrete individual act of denial of tenure and Ricks' subsequent termination merely a consequence thereof. In sum, the Court held that the act of denial of tenure is a specific event which happens on a specific date and that the period for filing a charge begins to run on that date. In finding no continuing violation, Justice Powell noted: "If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment. But the complaint alleges no such acts." *Ricks,* 449 U.S. at 257 (footnote omitted).

In fact, the Complaints filed by the respondents herein do identify such continuing violations. Each respondent's Complaint alleges that petitioner discriminated by "paying [to each respondent] lesser salaries, commissions, and

bonuses as a female employee than male employees of BERLITZ for doing substantially equal work requiring substantially equal skill, effort and responsibility . . ." both as to their male predecessors at their respective schools and as to male directors of other Berlitz schools. Excerpts of the Clerk's Record, 1:32-2:9, Complaint of Vicki Bartelt, 23:2-11, Complaint of Lydia Melsen. Unlike *Ricks,* respondents herein *did* allege discriminatory acts which continued until the termination of their employment, i.e., the payment of unequal compensation, a "series of *separate* but related *acts* throughout the course of [their] employment" (*Jenkins,* 635 F.2d at 312 (emphasis added)), and a "continuing pattern of discrimination. . . ." *Satz,* 619 F.2d at 744 n.10.[2]

The opinion below is also consistent with *Evans.* In that case, the discriminatory policy of requiring termination upon marriage had completely ceased to exist at the time plaintiff brought charges. Therefore, no continuing *violation* existed, only the present *effect* of a *prior completed act.* In the present case, the discriminatory policy had not ceased when plaintiffs filed their EEOC charges but continued through each respondent's entire course of employment.

Despite the clear distinction between the completed past acts of discrimination in *Evans* and the continuing present

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[2]The inapplicability of *Ricks* to an equal pay claim was recognized in *Schulte v. State of New York,* 533 F. Supp. 31 (E.D.N.Y. 1981): "This court [concludes] that *Ricks* does not apply to these facts, where plaintiffs are challenging on-going terms and conditions of employment. Moreover, numerous courts have concluded that challenges to discriminatory pay practices under the EPA are continuing violations that accrue on each regular payday." *Id.* at 35.

discriminatory acts complained of by respondents, petitioner attempts to characterize the continuing payments of a discriminatory salary as "simply 'a delayed, but inevitable consequence' of the compensation first set upon replacement of their male predecessors." Petitioner's Opening Brief at 11. However, this interpretation would effectively insulate an employer for all time against a claim of unequal wages as long as the employer kept wages low based on an initial discriminatory wage rate not challenged within 300 days of first employment. Following the reasoning of petitioner, the employer could pay a woman employee a discriminatory wage even after promotion as long as salaries were based on the initial unchallenged wage differential. Such a result is illogical and completely inconsistent with the broad reach of Title VII.

Petitioner mistakenly argues that the relevant test is whether respondents' salaries were *modified* in a manner different from that of other school directors after their initial replacement of male predecessors. Petitioner's Opening Brief at 12. This characterization of the problem is simply a self-serving distortion. The relevant inquiry is whether the present wage scales themselves are discriminatory as alleged to be by respondents, just as the inquiry in *Evans* was whether the present seniority system operated in a discriminatory manner.[3]

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[3]Similarly, this Court's ruling in *Chardon v. Fernandez*, 454 U.S. 6 (1981) (notice of future termination began time period in which to file charges where plaintiff had not alleged discriminatory acts subsequent to the date on which the decision to terminate was made) is inapposite in that it involved a completed past act of discrimination rather than allegations of a continuing present violation.

Second, petitioner suggests that the opinion below is inconsistent with employment decisions on continuing violations from other circuits. *See* Petitioner's Opening Brief at 14. However, each case cited by respondent addresses employment decisions that involved *completed past* acts of discrimination: *Milton v. Weinberger,* 645 F.2d 1070 (D.C. Cir. 1981) (denial of promotion); *Heymann v. Tetra Plastics Corp.,* 640 F.2d 115 (8th Cir. 1981) (initial job assignment); *Patterson v. General Motors Corp.,* 631 F.2d 476 (7th Cir. 1980), *cert. denied,* 451 U.S. 914 (1981) (denial of promotion); *Goldman v. Sears, Roebuck & Co.,* 607 F.2d 1014 (1st Cir. 1979), *cert. denied,* 445 U.S. 929 (1980) (job transfer); *Martin v. Georgia-Pacific Corp.,* 568 F.2d 58 (8th Cir. 1977) (denial of transfer). Such holdings in no way diminish the vitality of the unbroken line of cases holding that equal pay violations are violations that recur throughout the course of employment with each discriminatory wage payment.[4]

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[4]For example, one of the cases cited as support for its position by petitioner is *Martin v. Georgia Pac. Corp.,* 568 F.2d 58 (8th Cir. 1977) (denial of job transfer). This case is from the same circuit as and precedes the holding in *Satz v. ITT Fin. Corp.,* 619 F.2d 738 (8th Cir. 1980) in which the court of appeals expressly held that the payment of unequal wages is a continuing violation that occurs as long as the unequal pay continues. *Id.* at 743.

The distinction between "*[c]ompleted* acts such as a termination . . . a job transfer, . . . or discontinuance of a particular job assignment . . ." and "claims of repeated failure to promote and a denial of equal pay [that] involve *ongoing* aspects of the employer-employee relationship," was cogently set forth in *Corbin v. Pan Am. World Airways,* 432 F. Supp. 939, 944 (N.D. Cal. 1977) (emphasis added) (citations omitted).

Trabucco v. Delta Airlines, 590 F.2d 315 (6th Cir. 1979) is likewise inapplicable. There, the court was looking at a completed act of job reclassification and the plaintiff did not contend that her present job classification constituted a Title VII violation.

In addition to misciting this Court's and other circuits' authority, petitioner posits three additional arguments that are without support. First, petitioner suggests that a continuing violation only exists if respondents identified others similarly situated and that respondents must demonstrate a "pattern and practice" of discrimination as found in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 336 (1977). Petitioner's Opening Brief at 12-13.

Petitioner's argument merits several responses. In fact, each respondent has alleged a pervasive policy of sex-based wage discrimination at Berlitz. Throughout the course of her employment, each respondent complained of continuing pervasive unequal treatment. *See* Excerpts of the Clerk's Record, Declarations of Melsen and Bartelt at 154-60.

More importantly however, petitioner is mistaken in its belief that the doctrine of continuing violations is applicable only in claims of class-based discrimination as opposed to individual Title VII claims. The logic of petitioner's argument is that no plaintiff bringing an individual action under Title VII can ever allege a continuing violation. Petitioner will find no support for its argument in the case law. In *Jenkins* and *Fisher v. Dillard University,* 499 F. Supp. 525 (E.D. La. 1980), individual employees alleging discriminatory compensation had "continuing violations" even though they did not allege broad-based, class-type allegations of across-the-board discrimination.

Even in *Ricks,* Justice Powell wrote that plaintiff, who did not make an across-the-board attack of "pervasive" discrimination against the University, could have alleged a continuing violation if the facts supported such a conten-

tion. *Ricks*, 449 U.S. at 257 (footnote omitted). That is, the Supreme Court recognized that an individual could allege a continuing violation so long as he or she alleged those acts which continued throughout and constituted the violation. Justice Powell stated no requirement that the employee also allege a "systematic" policy of discrimination or launch a sweeping attack on an employer's employment practices.[5]

Second, petitioner suggests that *Jenkins* and *Satz* are distinguishable because they dealt with an equal pay comparison between plaintiffs and males *currently* employed by defendant. Petitioner's Opening Brief at 13. However, the practical effect of such an argument would be to leave plaintiffs in single incumbent positions with no protection against blatant sex-based differentials in pay. Several jurisdictions have recognized this illogical result and held that Title VII does not bar equal pay claims merely because a particular job is a single incumbent position. *See Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071 (5th Cir. 1981); *Taylor v. Philips Industries, Inc.*, 593 F.2d 783 (7th Cir. 1979); *Dacus v. Southern Col-*

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[5]In fact, in claiming a continuing violation from the payment of unequal wages, it is unnecessary to allege a discriminatory policy. Each wage payment is itself a discriminatory act. *Jenkins v. Home Ins. Co.*, 635 F.2d 310, 312 (4th Cir. 1980); *Fisher v. Dillard Univ.*, 499 F. Supp. 525, 528 (E.D. La. 1980). In any case, respondents have alleged facts sufficient to establish both a policy of discrimination throughout the course of employment, *and* "a series of separate but related acts" (*see Jenkins*, 635 F.2d at 312). *See* Excerpts of the Clerk's Record, Declarations of Melsen and Bartelt at 154-60.

lege of Optometry, 476 F. Supp. 639 (1979), *aff'd and remanded on other grounds*, 657 F.2d 81 (1981), *cert. denied*, 454 U.S. 1147 (1982).[6]

Third, petitioner claims that the result of the opinion below is to nullify the time requirements of 42 U.S.C. § 2000e-5(e). However, the decision below does nothing of the sort. Rather, it reaffirms that in a claim for denial of equal pay the charging party must file a claim within 300 days of the alleged discriminatory act, i.e., within 300 days of the issuance of the discriminatory paycheck. As such, the opinion below is fully consistent with other circuits and accurately distinguishes between completed past acts of discrimination (*Ricks* and *Evans*) and continuing present discriminatory acts (*Satz* and *Jenkins*). Given the total unanimity of authority with respect to the continuing violation question presented herein, there is no necessity for this Court to grant the Petition and review the decision below.

B. The Court Below Properly Applied County of Washington v. Gunther in Holding That the "Single Establishment" Limitation of the Equal Pay Act Is Not Incorporated Into An Equal Pay Claim Under Title VII

Petitioner contends that the "single establishment" requirement of the Equal Pay Act, 29 U.S.C. § 206(d)(1), is incorporated into an equal pay claim under Title VII,

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[6]The appropriateness of making pay comparisons under the Equal Pay Act between plaintiffs and prior employees was set forth in *County of Washington v. Gunther*, 452 U.S. 161, 201-02 (1981); *id.* at 178 n. 19 (Rehnquist, J., dissenting). Thus even if it was necessary for plaintiffs to meet the criteria of the Equal Pay Act to state a claim under Title VII (petitioner's second argument, discussed *infra*), that requirement is met here. *See* Petitioner's Opening Brief, app. A at 3-4 n.1.

by the Bennett Amendment, 42 U.S.C. § 2000e-5(e), and that such requirement bars the claim of respondents herein that their pay was less than that of male directors employed at petitioner's schools in other locations.[7]

The Court of Appeals for the Ninth Circuit rejected petitioner's argument under the recent authority of *County of Washington v. Gunther,* 452 U.S. 161 (1981). The *Gunther* Court held that the Bennett Amendment requires incorporation only of the four affirmative defenses of the Equal Pay Act into Title VII. *Id.* at 168-71. This Court's precise articulation on the matter specifically stated that the "first part" of the Equal Pay Act which is "purely prohibitory" (and which contains the "single establishment" limitation) is not made a part of Title VII by the Bennett Amendment because it authorizes nothing. Only the "second part", containing the affirmative defenses, is so incorporated. *Gunther,* 452 U.S. at 169.

Petitioner argues that *Gunther* is distinguishable on its facts in that, because respondents herein make claims of equal pay for equal work, which ultimately was not the basis of the female sheriffs' complaints in *Gunther,* the *Gunther* logic does not apply. That is, where plaintiffs make an *equal pay* claim under Title VII the *entire* Equal Pay Act, including the single establishment limitation, applies.

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[7]Petitioner suggests that the question to be decided is "whether Equal Pay Act standards govern equal pay claims brought under Title VII. . . ." Petitioner's Opening Brief at 15. However, this case does not present the appropriate occasion to review the entire relationship between Title VII and the Equal Pay Act. The issue here is a narrow one—whether the "single establishment" clause must apply to equal pay Title VII claims.

However, adoption of such a proposition by this Court would ignore several pressing points. First, the Supreme Court now has held specifically that *only* the four defenses of the Equal Pay Act come within the ambit of Title VII. This holding was not as narrow as petitioner urges. The Court gave full consideration to the legislative history of the Bennett Amendment (*id.* at 171-76), the broad remedial purposes of Title VII (*id.* at 178), and the relationship between Title VII and the Equal Pay Act (*id.* at 178-80). Nowhere in the *Gunther* opinion does the Court's language suggest the narrow application now urged by petitioner herein, and petitioner does not refer the Court to any such language in its earlier opinion.

Petitioner does refer this Court to language in the appellate court's *Gunther* decision that equal pay claims under Title VII are governed by Equal Pay Act standards. Petitioner's Opening Brief at 17-18. However, petitioner has taken this language out of context. Although the appellate court in *Gunther* stated that plaintiffs must show that their "job requirements are substantially equal" to their male comparables (*Gunther v. County of Washington*, 623 F.2d 1303, 1321 (9th Cir. 1979) (Supp. Opn. on Denial of Rehearing)), the reference to the Equal Pay Act standards does not detract from the Ninth Circuit's and this Court's holding that *only* the four defenses of the Equal Pay Act are incorporated within wage claims brought pursuant to Title VII. In fact, the Ninth Circuit's reference to the Equal Pay Act standards was not because the Equal Pay Act standards were incorporated into Title VII, but only because they were "relevant in this inquiry". *Id.* The holding in the Ninth Circuit *Gunther* opinion remained clear—

the Bennett Amendment incorporates within Title VII only the four defenses of the Equal Pay Act, and nothing else.

The only case that has dealt precisely with the relationship between the "single establishment" clause of the Equal Pay Act and Title VII prior to the Ninth Circuit's appellate opinion herein, *Wetzel v. Liberty Mutual Insurance Co.*, 449 F. Supp. 397 (W.D. Pa. 1978), recognized that while Equal Pay Act standards may be "relevant" in determining equal pay claims brought pursuant to Title VII, the conclusion did not follow that the single establishment limitation was incorporated within Title VII by the Bennett Amendment.

> The only remaining question, then, is whether Title VII also contains a requirement that plaintiffs prove their case "establishment" by "establishment." Although the cases discussed . . . have uniformly held that a Title VII plaintiff must, in this kind of case, prove that the two jobs in question are substantially equal in skill, effort and responsibility, we have found no precedent precisely on this point . . . . Because *Title VII nowhere contains a requirement similar to the separate "establishment" of the Equal Pay Act, . . . and because the Bennett Amendment fully serves its function without incorporating the establishment requirement into Title VII, we conclude that there is no such limitation on Title VII relief with regard to discrimination in compensation.*

Id. at 407 (emphasis added).[8]

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[8]Several Title VII equal pay cases after *Gunther* make reference to the Equal Pay Act requirement of 'substantially equal skill, effort and responsibility.' *E.g., Odomes v. Nucare, Inc.*, 653 F.2d 246 (6th Cir. 1981); *Francoeur v. Corroon & Black Co.*, 552 F. Supp. 403 (S.D. N.Y. 1982); *Kouba v. Allstate Ins. Co.*, 523 F. Supp. 148 (E.D. Cal. 1981), *rev'd on other grounds and remanded*, 691 F.2d

The second fallacy in petitioner's argument follows from its failure to recognize that the Equal Pay Act and Title VII are separate statutes which were meant to *supplement* rather than supplant one another. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974); *IUE v. Westinghouse Electric Corporation*, 631 F.2d 1094, 1101 (3d Cir. 1980). In *Gunther*, the Court recognized that because the Equal Pay Act was *not* incorporated *en toto* into Title VII, plaintiffs could choose between the statutes and use them in different ways. The Court apparently saw no problem with such a possibility and, in fact, argued that such a choice affirmed the vitality of both statutes. The Court stated:

> The argument in the dissent that under our interpretation, the Equal Pay Act would be impliedly repealed

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873 (9th Cir. 1982). However, the reliance on this standard is the result of *judicial interpretation* and not because the Bennett Amendment mandates its incorporation from the Equal Pay Act. *Judicial* incorporation of the equal skill, effort and responsibility standards of the Equal Pay Act for *equal pay* claims under Title VII is quite a different matter from incorporation of all other statutory *limitations* of the Equal Pay Act. The *Gunther* Court addresses this precise point:

> Under petitioners' reading of the Bennett Amendment, only those sex-based wage discrimination claims that satisfy the "equal work" standard of the Equal Pay Act could be brought under Title VII. In practical terms, this means that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man *in an equal job in the same establishment*, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioners' interpretation.

Gunther, 452 U.S. at 178-79 (emphasis added).

> and rendered a nullity . . . is mistaken. Not only might the substantive provisions of the Equal Pay Act's affirmative defenses affect the outcome of some Title VII sex-based wage discrimination cases, . . . but the procedural characteristics of the Equal Pay Act also remain significant. For example, the statute of limitations for backpay relief is more generous under the Equal Pay Act than under Title VII, and the Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts. Given these advantages, many plaintiffs will prefer to sue under the Equal Pay Act rather than Title VII.

Gunther, 452 U.S. at 175 n. 14

Third, and perhaps most important, incorporation of the entire Equal Pay Act within Title VII for *equal pay claims* would create the very abuses and inconsistencies petitioner fears. It would create the anomalous situation whereby women with equal pay claims under Title VII would have *lesser* rights than persons who claim denial of equal pay under Title VII based on race, color, religion, or national origin.

This disparity can be seen in regard to the question of multiple establishments. A person raising a race claim under Title VII may compare his or her treatment with the treatment of persons of the same race at other facilities of the employer. Similarly, under a Title VII race claim an employer may justify wage differentials precisely because they occur at different locations provided they are not the result of intent to discriminate. 42 U.S.C. § 2000e-2(h). The Equal Pay Act encompasses sex claims only. 29 U.S.C. § 206(d). Therefore, if respondent's arguments were ac-

cepted and the "single establishment" portion of the Equal Pay Act were incorporated into Title VII, females making equal pay claims would be the only individuals making use of Title VII who could *not* raise the issue of multiple facilities.

Ironically, the result of petitioner's argument would be that *male* employees, suing on a wage disparity claim under Title VII, *e.g., Boyd v. Madison County Mutual Insurance Co.*, 653 F.2d 1173 (7th Cir. 1981), would have a broader remedy than similarly situated women, allegedly because of a statute meant to eradicate wage discrimination against *women*. If "consistency" in application of the statutes is truly the goal, such anomalies should be avoided. The Court's holding in *Gunther*, that only the four defenses of the Equal Pay Act are incorporated into Title VII, furthers that goal.

The court below, in ruling against petitioner herein, correctly interpreted *Gunther* to apply to all sex-based wage discrimination, including equal pay claims. *See* Petitioner's Opening Brief, app. A at 7.[9] The court considered petitioner's claim that a decision contrary to its position would thwart the policies of the Equal Pay Act. In rejecting petitioner's dire prediction, the court correctly recognized the procedural and substantive differences between Title VII and the Equal Pay Act that serve to ensure the vitality and integrity of each statute and provide alternative the-

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[9]Even assuming, *arguendo*, that *Gunther* does not apply to Equal Pay claims, the underpinning of that case and the reasoning of the court below, amply demonstrate that the same result would be required in the present case. This conclusion is further supported by the reasoning in *IUE v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1101 (3d Cir. 1980) and *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397, 407 (W.D. Pa. 1978).

ories to plaintiffs seeking redress from sex-based employment discrimination. *Id.*

The court below considered petitioner's argument and correctly rejected it. The authority of *Gunther* clearly encompasses the issue raised herein. Petitioner repeatedly asserts that there is confusion and uncertainty over what standards govern equal pay claims brought under Title VII. However, the only uncertainty before this Court is that created by petitioner in the hope of winning review. Such review is unnecessary and should be denied.

CONCLUSION

Because there is no conflict between circuits and because the court below correctly decided the issues presented herein, respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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